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FEB 13 1961
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IN THE

Supreme Court of the United States

October Term, 1960.

No. 164.

WILLIAM H. BURTON,

Petitioner,

v.

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware,

and

EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware,

Respondents.

On Certiorari From the Supreme Court of the State of Delaware.

MEMORANDUM SUBMITTED BY RESPONDENT, EAGLE COFFEE SHOPPE, INC., UNDER RULE 41(5).

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OCTOBER TERM, 1960.

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MEMORANDUM SUBMITTED BY RESPONDENT, EAGLE COFFEE SHOPPE, INC., UNDER RULE 41(5).

Respondent submits this memorandum under Rule 41(5) of the Rules of the Supreme Court of the United States. This memorandum presents late authority that was

not available for respondent's brief in chief.[1] The *amicus curiae* brief supporting the petitioner was received in the form of page proofs on January 19, 1961. The printed briefs were received January 23, 1961. Thus, the respondent did not receive either form until after it had filed its brief in chief on January 18, 1961. Respondent, therefore, feels it is entitled to reply to the *amicus curiae* memorandum submitted by the United States. This memorandum constitutes its reply.

ARGUMENT.

The respondent submits that the Eagle Coffee Shoppe is not integrally related to any of the activities in which the Wilmington Parking Authority is engaged. Also, the respondent submits that the lease was not executed with the purpose of allowing the Parking Authority to escape its constitutional obligation not to discriminate. In the *amicus curiae* memorandum submitted by the United States, it is stated at page 3:

> "What is material and decisive, for purposes of the Fourteenth Amendment, is that the state has chosen to place its power behind the discrimination. This it may not do in any form or through any device. . . . This is particularly so where, as in this case, the leased property is integrally related, both physically and by financial ties, to the conduct of other activities in which the public authority is engaged."

A more complete examination of the facts than a superficial examination of the physical and financial relations between the restaurant and the Parking Authority shows that this restaurant is not within the nexus of state action.

To assist this Court in its analysis of the facts in the case at hand, the respondent sets forth the approach sug-

1. Lewis, *The Meaning of State Action*, 60 Col. L. Rev. 1083 (1960).

gested by Thomas P. Lewis in *The Meaning of State Action*, 60 Col. L. Rev. 1099, 1100:

> "A connection between the state and the conduct of the lessee may be found in the relationship of a state to all of its leased property as owner and lessor. It is equally possible, however, to analyze the situation in terms of the private character of the lessee, especially when he has paid a fair consideration for the lease. The bases of these diverse analyses must be diverse attitudes concerning the existence of a principal-agent relationship between the lessor and lessee, or diverse attitudes covering the nature of the state's duty as lessor. As in the voting cases, the finding of a state duty to regulate its private tenant and a description of the lessee as an agent of the state may be two ways of saying the same thing. In any event, unless a lessee of the state is always an agent of the state, some basis must exist for labeling him an agent in particular cases. *The view taken here, which the cases seem to support, is that the nature of the function performed is the controlling factor.* That the state is lessor has significance because the circumstances bringing the lessor-lessee relationship into existence may indicate the nature of the function." (Emphasis supplied.)

Here the function of the state agency, i.e., the Parking Authority, is to promote the public safety and welfare by providing for off-street parking in the City of Wilmington.[2] The function of one of the lessees of the Parking Authority is to engage in the restaurant business as a private entrepreneur. The Delaware statute creating the Parking Authority does not indicate in any way that the Authority is to provide any other services for the public than off-street parking. The restaurant did not lease the space in the Parking Authority's building for the purpose of cater-

2. 22 Del. C. § 501, cited in full in Petitioner's Brief, pp. 19, 20.

ing to the parking customers. The rented space used by the restaurant is a primary location for such a business independent of the activities of the Parking Authority. There is no public entrance leading from the parking portion of the facility into the restaurant. Customers of the restaurant enter by means of an entrance located on a main public street (R. 49). Thus, an examination of all the surrounding circumstances shows that the restaurant's purposes and activities do not fall within the functions of the Parking Authority.

The circumstances bringing the lessor-lessee relationship into existence are plainly set forth in the Delaware statute. Simply, the highest bidder was to be granted the various rental areas for the purpose of providing a rental income to the authority necessary for the financing and operation of the facilities.[3] The memorandum for the United States seizes upon this point and says at page 10:

> "... And, since the leasing activity is vital to the functioning of the authority, it cannot be heard to assert that it is free to conduct that activity without complying with the constitutional standards applicable to all forms of state action."

Respondent submits that only the leasing activity and not the activity of the restaurant is "vital to the functioning of the Authority." Thus, the restaurant is not integrally related to the function of the public authority and not bound by the constitutional requirements of state action.

The absence of other evidentiary facts shows that the restaurant is a private business free to select the persons with whom it will do business. The opinions cited by the petitioner and the United States have decided that an activity falls within the realm of state action for factual reasons that are not existent in the case at hand. There is no history of discrimination by the Parking Authority which

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3. 22 Del. C. § 504(a).

would make this lease a subterfuge to avoid the requirements of the Fourteenth Amendment.[4] Also, there is no statutory control,[5] nor administration and policy-direction control of the activity in question.[6] Finally, and most important, a thorough examination of the functions of the public authority and the restaurant shows there is nothing more than a bare lessor-lessee relationship. The functions are not integrally related since the restaurant facility does not exist by virtue of a governmental effort to serve a public need or want.[7]

An analogous situation arose in a case before the Interstate Commerce Commission. *NAACP v. St. Louis-S. F. Ry.*, 297 I. C. C. 335, 1 Race Rel. L. Rep. 263 (1955). A restaurant located in a railroad terminal segregated its white and negro customers. The restaurant, which was a lessee of the terminal, was located in the terminal which was used by several interstate carriers. The Commission held that the terminal had to eliminate discriminatory practices in its restrooms and waiting rooms, but it held that the restaurant was not under jurisdiction of the Interstate Commerce Commission. The Commission did not order the restaurant's discriminatory practices to cease because it found upon examination of the facts beyond the lease arrangement that the restaurant was not an integral part of the terminal's activities.

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4. Such existed in: *Culver v. City of Warren*, 84 Ohio App. 373, 83 N. E. 2d 82 (1948); *Kerr v. City Comm'rs*, 151 Kan. 565, 100 P. 2d 709 (1940); *Tate v. Departments of Conservation and Development*, 133 F. Supp. 53 (E. D. Va. 1955).

5. *Boman v. Birmingham Transit Company*, 280 F. 2d 531 (5th Cir. 1960).

6. *Pennsylvania v. Board of Directors of City Trusts*, 353 U. S. 230 (1957) (The *Girard* Case).

7. *Derrington v. Plummer*, 240 F. 2d 922 (5th Cir. 1957), cert. den. 353 U. S. 924 (1957); *Nash v. Air Terminal Services, Inc.*, 85 F. Supp. 545 (E. D. Va. 1949). See Lewis, *The Meaning of State Action*, 60 Col. L. Rev. 1083, 1100 (1960).

Therefore, *Boynton v. Virginia*[8] is not analogous to the case at hand because the facts reveal the *functions* of both the interstate bus terminal and the restaurant located therein to be integrally related. Respondent submits that this Court's opinion in *Boynton* and the Commission's opinion in *St. Louis-S. F. Ry. Co.* represent the best approach in determining whether the lessee falls within the constitutional requirement of non-discrimination, that is, by an examination of the respective functions of the lessor and lessee.

If every lessee renting property from a state becomes a part of state action, it will result in a serious financial limitation on the state. Many private businesses will not bid on or enter such a lease agreement which will require them to meet the constitutional requirements of a public authority. This will limit financial assistance available to the state and be a burden which the public must bear. Since sources of income are important to the state, a reversal of the Delaware Supreme Court's decision would have the practical effect of a benefit to the Negro in one respect, but the reversal would also deprive the general public, including the Negroes, of a valuable source of income to the state.

Unless this Court is to hold that every lessor and lessee relationship, in which the state is lessor, binds the lessee to the requirements of the Fourteenth Amendment, then there must be a way of determining which lessees fall within such constitutional requirements. Respondent submits that a thorough examination of the activities and purposes of the lessor and lessee is the best approach. Since such an examination reveals a bare lessor-lessee relationship in the case at hand, the respondent, Eagle Coffee Shoppe, should be free to do business with whom it chooses. Mere rental income and physical connection with the lessor does not bring the restaurant within the requirements of State action.

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8. *Boynton v. Virginia*, — U. S. —, 81 S. Ct. 182 (1960).

CONCLUSION.

For the reasons stated above, the appeal should be dismissed and judgment should be rendered for respondents on the petition for certiorari.

Respectfully submitted,

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